(13)

No. 96-188

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

GENERAL ELECTRIC COMPANY, *et al.*,
Petitioners,

v.

ROBERT K. JOINER, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

BRIEF OF AMICUS CURIAE THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Amicus will address the following question:

Whether district court decisions regarding the admissibility of expert testimony should be reviewed under the traditional abuse of discretion standard applied to evidentiary decisions.

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INTEREST OF AMICUS CURIAE[1]

The Washington Legal Foundation ("WLF") is a non-profit public interest law and policy center based in

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[1] Pursuant to Supreme Court Rule 37.6, amicus hereby indicates that no counsel for a party in this case authored this amicus brief in whole or in part.

Washington, D.C., with supporters nationwide. WLF regularly appears before federal and state courts promoting economic liberty, free enterprise principles, and a limited and accountable government. WLF's Legal Studies Division also publishes monographs and other publications on these topics.

In particular, WLF has devoted substantial resources over the years through litigation and publishing to promote civil justice reform, including tort reform. WLF appeared as an amicus curiae in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and its Legal Studies Division published a monograph on the subject. Charrow, "Scientific Evidence In The Courtroom: Admissibility And Statistical Significance After *Daubert*" (1994).

WLF believes that it can bring a broader perspective on the issues presented in this case, which will assist this Court in deciding this case in such a way as to give clearer guidance to appellate courts reviewing admissibility decisions regarding expert evidence. By letters filed with the Clerk of the Court, the parties have consented to the filing of this brief.

STATEMENT OF THE CASE

Amicus curiae is, in the interest of brevity, omitting any detailed statement of the facts in this case. Amicus curiae adopts by reference the statement of facts contained in Petitioners' Brief.

In brief, Respondents, an electrician and his wife, sued Petitioners in state court in Georgia, claiming that the

husband's lung cancer (he had smoked for eight years) had been "promoted" by exposure to polychlorinated biphenyls ("PCBs"), furans, and dioxins in transformers manufactured by Petitioners General Electric and Westinghouse. The suit was removed to the United States District Court for the Northern District of Georgia.

In connection with the Petitioners' motion for summary judgment, the District Court reviewed in detail the scientific opinions of Respondents' experts and the methodologies they employed to reach those opinions. The District Court concluded that although there was a scientific basis for opining that there had been exposure to PCBs (but not furans or dioxins), the Respondents' experts had presented no scientific support on causation and, therefore, their opinions did not rise above "subjective belief or unsupported speculation." *Joiner v. General Elec. Co.*, 864 F. Supp. 1310, 1325 (N.D. Ga. 1994). Accordingly, the District Court, citing this Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), excluded the Respondents' proffered expert testimony on causation under Rule 702 of the Federal Rules of Evidence. Given the plaintiffs' failure to produce admissible scientific evidence of causation, the District Court granted summary judgment for the Petitioners. 864 F. Supp. at 1326.

Splitting 2-1 and issuing three separate opinions, the Court of Appeals for the Eleventh Circuit reversed. *Joiner* v. *General Elec. Co.*, 78 F.3d 524 (11th Cir. 1996). The judges disagreed as to the proper standard and nature of appellate review of district court rulings under *Daubert*.

Judge Rosemary Barkett, writing for the majority, recognized that district court rulings on admissibility are

ordinarily "reviewed for abuse of discretion." *Id.* at 529. Nevertheless, Judge Barkett applied what she characterized as "a particularly stringent standard of review to the trial judge's exclusion of expert testimony," because the Federal Rules of Evidence display a preference for admissibility, and cited as authority this Court's decision in *Daubert* and the Third Circuit's opinion in *In re Paoli R.R. Yard PCB Litigation*, 35 F. 3d 717, 750 (3d Cir. 1994), *cert. denied sub nom. General Elec. Co. v. Ingram*, ___ U.S. ___, 115 S.Ct. 1253 (1995). *See* 78 F.2d at 529. Using this "particularly stringent standard of review," the majority conducted its own examination of the opinions of the two experts and concluded that the District Court had "improperly assessed the admissibility of the proffered scientific expert testimony." *Id.* at 528. The majority rebuked the District Court for examining whether there was support in science for each link in the reasoning leading to the experts' conclusions, concluding that the District Court should have accepted the conclusions "viewed in their entirety." *Id.* at 532. Reexamining the entire record, including materials not cited by any party in the District Court, the Court of Appeals held that "the testimony of plaintiffs' experts was erroneously excluded," and reversed. *Id.* at 534.

Judge Edward S. Smith, Senior U.S. Circuit Court Judge for the Federal Circuit and sitting by designation, dissented, specifically disagreeing with the majority's holding as to the standard of appellate review. *Id.* at 536. Citing many decisions from other Circuits, the dissent concluded that "[i]n applying the Daubert framework, the trial court's ruling on whether the expert opinion is (1) reliable . . . and (2) relevant . . . is reviewed for abuse of discretion." *Id.* "Those circuits addressing Daubert" he

found, give "deference to the trial court's admissibility determinations." *Id.*, n.1 (citations omitted). The dissent indicated that the trial court's `gatekeeper' function requires broad discretion. Accordingly, "[w]e should not require the trier of fact to accept blindly the expert's word to fill the analytical gap between proffered `scientific knowledge' and the expert's conclusion." *Id.* at 535. Approving "the trial court's step-by-step approach," *id.* at 540, the dissent stated that:

> [S]ifting through the expert's testimony is a crucial "gatekeeping" function that not only requires the trial court to decide which experts may testify, but also requires the trial court to decide what the experts may testify about (i.e., the trial court must separate the wheat from the chaff). . . . [A]n expert may not bombard the court with innumerable studies and then, with smoke and sleight of hand, leap to the conclusion.
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> * * * *
>
> [I]f the trial court finds the expert testimony requires too great a leap of faith across the analytical gap, it may properly request good grounds to bridge the gap before admitting the testimony. . . . This is not too onerous a request.

Id. at 537, 539 (citations omitted). The dissent concluded that "[t]he trial court properly applied Daubert and did not abuse its discretion in ruling certain expert testimony inadmissible." *Id.* at 540. The Petitioners' request for rehearing and rehearing *en banc* were denied.

SUMMARY OF ARGUMENT

District court decisions regarding the admissibility of expert testimony should be reviewed under the same abuse of discretion standard historically applied to all other evidentiary rulings. Because each case presents to the court different facts and issues, the district court, as the gatekeeper of evidence, is uniquely situated to evaluate proffered expert testimony to determine whether it is scientific and, if so, whether it is useful to the trier of fact and relevant to the issues being litigated. Neither the adoption of the Federal Rules of Evidence in 1975, nor this Court's ruling in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), signaled a need to depart from the abuse of discretion standard that appellate courts have traditionally applied when reviewing the evidentiary rulings of trial courts.

The district court's evidentiary gatekeeping role, which *Daubert* firmly established, mandates the broad discretion afforded their evidentiary decisions. In order to apply the applicable evidentiary framework regarding expert testimony to the unique facts and circumstances of each case, district courts must invest a significant amount of time reviewing the record to understand the scientific evidence presented by the experts and the methodologies they employ to reach their opinions. The district courts spend an equal amount of time parsing through the allegations of the parties in order to determine whether the scientific evidence is relevant to issues in a case. Accordingly, district court decisions regarding the admissibility of scientific evidence should only be reversed if the district court abused its discretion by reaching a "clearly erroneous" result.

Moreover, this standard of review should apply regardless of what stage of the proceeding the evidentiary determination is made. Having lived with the case from its inception, and having overseen the day-to-day development of the action through pre-trial conferences, pre-trial rulings, and supervision of discovery, the district courts are in a far better position to evaluate the evidence that is presented than appellate courts reviewing a cold record. Indeed, it would be a tremendous waste of judicial resources and contrary to our legal system's policy of resolving disputes finally and quickly to treat a district court's evidentiary decisions on a dispositive motion as a mere rehearsal for later appellate review.

ARGUMENT

I. TRIAL COURT DECISIONS REGARDING THE ADMISSIBILITY OF PROFFERED SCIENTIFIC EVIDENCE SHOULD BE GIVEN SIGNIFICANT DEFERENCE

A. Historical Standard Of Review On Evidentiary Rulings

A district court's evidentiary decisions have traditionally been reviewed by this Court[2] and in all of the

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[2] *See, e.g., Stillwell & Bierce Mfg. Co. v. Phelps*, 130 U.S. 520, 527 (1889); *Congress & Empire Spring Co. v. Edgar*, 99 U.S. 645, 658 (1878); *Salem v. U.S. Lines Co.*, 370 U.S. 31, 35 (1962); *Hamling v. United States*, 418 U.S. 87, 108 (1974).

federal circuits for abuse of discretion.[3] The reason for this is twofold. First, it is impractical to formulate an evidentiary rule to cover each and every situation that could arise in a proceeding, given the "'multifarious, fleeting, special, narrow facts that utterly resist generalization.'" *See* 19 *Moore's Fed'l Practice* § 206.05[1] (1997) (quoting Rosenberg, "Judicial Discretion of the Trial Court, Viewed from Above," 22 SYRACUSE L. REV. 635, 662 (1971)).

Second, evidentiary decisions involve a balancing of a variety of factors, including, but certainly not limited to, the usefulness, reliability and relevance of the proffered information. Because no two lawsuits are identical, district courts are uniquely situated to evaluate the context and circumstances of the proffered evidence to determine the need for its admissibility in a particular case.

Indeed, under the common law, courts have long recognized the discretion that should be afforded a trial

[3] *See, e.g., Mitchell v. Dupnik*, 75 F.3d 517, 527 (9th Cir. 1996); *Boughton v. Cotter Corp.*, 65 F.3d 823, 831 (10th Cir. 1995); *Affiliated Mfrs., Inc. v. Aluminum Co. of America*, 56 F.3d 521, 525 (3d Cir. 1995); *Walker v. NationsBank of Florida N.A.*, 53 F.3d 1548, 1554 (11th Cir. 1995); *O'Dell v. Hercules, Inc.*, 904 F.2d 1194, 1200 (8th Cir. 1990); *Fisher v. Vassar College*, 70 F.3d 1420, 1445 (2d Cir. 1995); *Buckner v. Sam's Club, Inc.*, 75 F.3d 290, 292 (7th Cir. 1996); *Kelly v. Boeing Petroleum Serv., Inc.*, 61 F.3d 350, 356 (5th Cir. 1995); *Carter v. Ball*, 33 F.3d 450, 456 (4th Cir. 1994); *Bath & Body Works, Inc. v. Luzier Personalized Cosmetics, Inc.*, 76 F.3d 743, 750 (6th Cir. 1996); *Blinzer v. Marriott Int'l, Inc.*, 81 F.3d 1148, 1158 (1st Cir. 1996); *Carey Canada, Inc. v. Columbia Cas. Co.*, 940 F.2d 1548, 1559 (D.C. Cir. 1991); *Munoz v. Strahm Farms, Inc.*, 69 F.3d 501, 503 (Fed. Cir. 1995).

court's evidentiary decisions. As early as 1894, in *Vaughan v. State*, the Arkansas Supreme Court stated:

> [T]he trial court had a discretion [to make the evidentiary decision], which was only limited to the extent it should not be abused. It is absolutely essential that circuit courts be vested with such discretion. The judge is acquainted with the surroundings, sees and hears the witnesses, and is *the one* to be satisfied as to whether the conditions exist. . . . [W]e will not review [the trial judge's] discretion to disturb his findings upon the facts before
> him.

58 Ark. 353, 24 S.W. 885, 890 (1894), *quoted in* I. *Wigmore on Evidence* (Tiller's rev.), § 16 at 757 (emphasis in original).[4]

[4] This reasoning has reverberated in decisions throughout the years. *See, e.g., Lee v. Suess*, 318 S.C. 283, 285, 457 S.E.2d 344, 345 (1995); *In re Interest of M.L.S.*, 234 Neb. 570, 571, 452 N.W.2d 39, 40 (1990); *Mitchell v. Commonwealth*, 908 S.W.2d 100, 102 (Ky. 1995); *Kealoha v. County of Hawaii*, 74 Haw. 308, 309, 844 P.2d 670, 671 (1993); *Morasso v. State*, 74 Fla. 269, 274, 76 So. 777, 779 (1917); *Kinsey v. Pacific Mut. Life Ins. Co.*, 178 Cal. 153, 156, 172 P. 1098, 1099 (1918); *Vallejo & N.R. Co. v. Reed Orchard Co.*, 169 Cal. 545, 147 P. 238 (1915); *Hardesty v. People*, 52 Colo. 450, 121 P. 1023 (1912); *Brooke v. People*, 23 Colo. 375, 48 P. 502 (1897); *City of Chicago v. Mullin*, 285 Ill. 296, 120 N.E. 785 (1918); *Commonwealth v. Coyne*, 228 Mass. 269, 117 N.E. 337 (1917).

This Court has applied this highly deferential standard of review to decisions regarding admissibility of witness testimony from experts dating at least as far back as 1878. For example, in *Congress & Empire Spring Co. v. Edgar*, 99 U.S. 645 (1878), this Court stated:

> Whether a witness is shown to be qualified or not as an expert is a preliminary question to be determined in the first place by the court . . . . Cases arise where it is very much a matter of discretion with the court whether to receive or exclude the evidence; but the appellate court will not reverse in such a case, unless the ruling is manifestly erroneous.

99 U.S. at 658 (citations omitted). Subsequent cases echoed this holding on the deference trial judges' expert evidentiary decisions are to receive.[5]

In *Salem v. U.S. Lines Co.*, 370 U.S. 31 (1962), this Court reiterated the deference to be accorded the trial court's rulings on the admissibility or inadmissibility of expert testimony. Specifically, the Court stated that, "the trial judge has broad discretion in the matter of the

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[5] *See, e.g., Stillwell & Bierce Mfg. Co. v. Phelps*, 130 U.S. 520, 527 (1889); *Montana Ry. Co. v. Warren*, 137 U.S. 348, 353 (1890); *Chateaugay Ore & Iron Co. v. Blake*, 144 U.S. 476, 484 (1892); *Gila Valley, Globe & N. Ry. Co. v. Lyon*, 203 U.S. 465, 475 (1906); *Chicago Great W. Ry. Co. v. McDonough*, 161 F. 657, 662 (1908); *U.S. Smelting Co. v. Parry*, 166 F. 407, 414 (1909); *Hines v. Consolidated Rail Corp.*, 926 F.2d 262, 265 (3d Cir. 1991); *United States v. Welch*, 945 F.2d 1378, 1381 (7th Cir. 1991), *cert. denied*, 502 U.S. 118 (1992).

admission or exclusion of expert evidence, and his action is to be sustained unless manifestly erroneous." *Id.* at 35 (citation omitted). Indeed, "[b]ecause gauging an expert witness's usefulness is almost always a case-specific inquiry, the law affords trial judges substantial discretion in connection with the admission or exclusion of opinion evidence." *United States v. Sepulveda*, 15 F.3d 1161, 1183 (1st Cir. 1993), *cert. denied*, 512 U.S. 1223 (1994).[6]

B. The Federal Rules Of Evidence Provide District Courts Broad Discretion To Make Evidentiary Decisions, Including Decisions Involving Expert Testimony

Prior to 1975, the admissibility of evidence in general and expert testimony in particular was governed by the common law. In 1975, Congress, with input from the legal community, enacted the Federal Rules of Evidence ("FRE"), which established guidelines and general requirements regarding the admissibility of evidence. By their nature, the FRE continue the tradition of providing the trial courts with

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[6] The Hon. Jack B. Weinstein, United States District Court Judge for the Eastern District of New York, posits (in reference to Rule 403, regarding exclusion of probative expert testimony based on its prejudicial effect), "[e]xpert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge. . . exercises more control over experts than over lay witnesses." Weinstein, *Rule 702 of the Federal Rules of Evidence Is Sound; It Should Not Be Amended*, 138 F.R.D. 631, 632 (1991).

broad discretion to make decisions regarding the admissibility or inadmissibility of evidence.[7]

For instance, under FRE 403 the district court judge must assess the evidence to determine if the probative value of the evidence is "substantially outweighed" by the potential prejudice, confusion, or undue delay. This standard requires the district court to balance a number of factors, including the issues in the case, the allegations of the parties and the nature and quality of the evidence. As a result, such evidentiary rulings have been accorded significant deference by appellate courts.[8]

The same is true under FRE 401 and 402, where the district court judge must ensure that the evidence admitted is relevant, which, again, requires the district court to have an in-depth understanding of the particular facts and circumstances of a case in order to exercise its discretion, as there is no hard and fast rule by which relevancy is determined. Thus, a district court's decision to admit or

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[7] *See Federal Rules of Evidence: Hearings Before the Senate Comm. on the Judiciary*, 93 Cong., 2d Sess. 206 (1974) (Testimony of Albert Jenner, Jr., Chairman of the Advisory Committee) ("[W]e could see that [allowing] discretion to be exercised by a judge is preferable to hardening a rule of evidence, to etching it in granite. We always operated, Mr. Chairman, to afford the U.S. district judges wise discretion with respect to the admission or exclusion of evidence.").

[8] *See, e.g., Construction, Ltd. v. Brooks-Skinner Bldg. Co.*, 488 F.2d 427, 431 (3d Cir. 1973) ("The task of assessing potential prejudice is one for which the trial judge, considering his familiarity with the full array of evidence in a case, is particularly suited.").

exclude evidence on the basis of relevance has also consistently been reviewed by appellate courts under an abuse of discretion standard.[9]

FRE 702, which governs the admissibility of expert scientific evidence, also requires trial courts to exercise considerable discretion. This is because FRE 702 sets forth guiding principles regarding the admissibility of scientific evidence by a qualified expert; it does not, however, provide a bright line test for rendering such determinations. Thus, before proceeding, the district judge must first determine if the witness is qualified as an expert by knowledge, skill, experience, training or education, and then, if the witness is deemed qualified, the district judge must further decide whether the scientific, technical or other specialized knowledge the expert provides will assist the trier of fact to understand the evidence or to determine a fact in issue. *See* FRE 702. Of necessity, this requires the district court to invest significant time and resources in

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[9] *See, e.g., United States v. Garr*, 461 F.2d 487, 489 (5th Cir.), *cert. denied*, 409 U.S. 880 (1972); *United States v. Ashley*, 555 F.2d 462, 465 (5th Cir.), *cert. denied*, 434 U.S. 869 (1977). Courts have also consistently applied this abuse of discretion standard when reviewing other evidentiary rulings under the FRE. *See, e.g., Horne v. Owens-Corning Fiberglas*, 4 F.3d 276, 282 (4th Cir. 1993) (review admissibility of evidence under FRE 804(b)(1) under an abuse of discretion standard); *United States v. Duran*, 4 F.3d 800, 803 (9th Cir. 1993), *cert. denied*, 510 U.S. 1078 (1994) (reviewing in-court identification testimony under FRE 901(a) and voice identifications under FRE 901(b)(5) under an abuse of discretion standard); *Trans Union Credit Infor. v. Associated Credit Serv., Inc.*, 805 F.2d 188, 192 (6th Cir. 1986) (review of district court's evidentiary ruling under FRE 408 regarding statements made in furtherance of settlement is clearly erroneous).

reviewing the scientific and technical evidence presented by the parties so that it can determine whether such evidence is reliable and whether it is relevant to the issues in the case.

Because such determinations must be made based on general guidelines, not specific rules, and require extensive factual development by the district court, they should be accorded the same deference given district court rulings regarding the relevance, reliability and potential prejudicial effect of evidence. Indeed, there is nothing in the legislative history of the FRE to suggest that a trial court's decisions regarding scientific expert evidence should be treated any differently by an appellate court than any other evidentiary ruling.[10]

C. The Teachings Of *Daubert* Compel A Continued Abuse Of Discretion Standard Of Review For Evidentiary Decisions Involving Expert Evidence

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), this Court held that FRE 702 superseded the *Frye* standard as to admissibility of scientific evidence.[11]

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[10] In fact, Rule 702 received little attention during the drafting and enactment process. The Rule was revised only slightly by its drafters; the phrase, "in the form of an opinion or otherwise" was added to the end of the provision to clarify that experts may testify to facts and relevant data in addition to an opinion. *See* Advisory Committee's Note, Rule 702. Similarly, the Rule generated no debate on the floor of Congress, where it was enacted without amendment. *See* 120 Cong. Rec. 2382 (Feb. 6, 1974).

[11] After its enactment, courts, while applying FRE 702, (continued...)

Specifically, a district court should admit into evidence scientific testimony offered by a qualified expert if such evidence will assist the trier of fact to understand the evidence or to determine a fact in issue. While clarifying the standard for admissibility, this Court explained:

> That the Frye test was displaced by the Rules of Evidence does not mean . . . that the Rules themselves place no limits on the admissibility of purportedly scientific testimony or evidence. Nor is the trial judge disabled from screening such evidence. To the contrary, under the Rules the trial judge must ensure that any and all scientific evidence admitted is not only relevant, but reliable.

509 U.S. at 589 and n.7. This Court went on to restate the two-prong test which must be satisfied in order for such expert testimony to be admitted under the FRE: (1) the expert testimony must be "scientific knowledge," *i.e.*, supported by appropriate validation; *and* (2) the evidence or testimony must assist the trier of fact to understand the evidence or to determine a fact in issue. *Id.* at 592.

In determining whether the expert evidence consists of "scientific knowledge," *Daubert* directs district courts to consider several non-exhaustive factors, including: (1) whether the theory or methodology used by the expert can be, and has been, tested; (2) whether the theory or

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[11](...continued)
continued to rely on the common law standard announced in *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923), which allowed such evidence to be admitted if it was "generally accepted" in the field.

methodology has been subjected to peer review and publication; (3) the known or potential rate of error of the method used; and (4) the degree of acceptance within the relevant scientific community. *Id.* at 593-94. Furthermore, in addition to determining whether the evidence will, in fact, be helpful to the trier of fact, the Court warned district court judges to pay heed to other evidentiary rules, including Rule 403, which allows district courts to exclude relevant evidence on the grounds of prejudice, confusion or waste of time.

Daubert, thus, instructs the district courts to make case-specific decisions regarding the admissibility of expert testimony, which will vary significantly depending on the facts, circumstances and issues of the particular case. In fact, *Daubert's* designation of the district courts as the evidentiary "gatekeepers" delegates to the district courts significant latitude to undertake the requisite evidentiary evaluation. Accordingly, just as district courts are afforded great discretion under evidentiary rules like FRE 401 and 403, district court decisions under FRE 702 should be afforded the same discretion and reviewed under the same abuse of discretion standard.

Moreover, although *Daubert* held that FRE 702 displaced the common law *Frye* standard regarding the conditions under which expert testimony should be admitted, *Daubert* did not counsel that expert evidentiary decisions required a heightened standard of review from that applied at common law. Indeed, as the *Daubert* decision recognized, common law should continue to serve as an aid to the application of the FRE, and a "'source of guidance in

the exercise of delegated powers.'"[12] Where a common law precept is entirely consistent with a Rule's general requirement of admissibility, that common law rule should be applied.[13] Accordingly, because the longstanding common law standard of review for expert evidentiary decisions -- abuse of discretion, *see supra* at 10-11 -- is entirely consistent with the broad discretion afforded a district court under FRE 702 in making expert evidentiary

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[12] 509 U.S. at 588 (quoting *United States v. Abel*, 469 U.S. 45, 51-52 (1984)). The *Abel* case concerned whether, under the Rules, it is permissible to impeach a witness for bias. The Court noted the unanimity of approach regarding impeachment in the courts, as well as the concept's conformity with the Rules, in holding that the doctrine of impeachment survived. 469 U.S. at 50-52.

[13] *United States v. Abel*, 469 U.S. 45, 51-52 (1984). *See also Bourjaily v. United States*, 483 U.S. 171 (1987). In *Bourjaily*, the court held that in determining preliminary facts relevant to Rule 801(d)(2)(E), there was no requirement that courts look only to independent evidence other than hearsay statements sought to be admitted. To the extent that its prior cases had indicated that courts could not look to the hearsay statements for any purpose, they had been superseded by Rule 104(a), which provides that, in determining preliminary admissibility questions the court "is not bound by the rules of evidence."

Bourjaily is instructive for yet another reason. The Court also held that the traditional, common law requirement that the standard of proof for preliminary questions concerning the admissibility of evidence (a preponderance of proof) survived, given that the Rules did not define the standard of proof that should apply. *Id.* at 175-76. A similar argument exists regarding the standard of review in this case. Because the FRE does not define the standard of review applicable to evidentiary decisions, courts should continue to apply the common law standard of abuse of discretion.

decisions, it should continue to be the applicable review standard for evidentiary decisions involving expert evidence.

II. THE ABUSE OF DISCRETION REVIEW STANDARD SHOULD APPLY REGARDLESS OF THE STAGE OF THE PROCEEDINGS IN WHICH THE EVIDENTIARY DETERMINATIONS ARE MADE

The fact that a district court's decision to exclude expert evidence pursuant to *Daubert* results in the granting of summary judgment should not alter the standard of review applied to the district court's evidentiary ruling. A district court's evidentiary decisions should be afforded broad discretion no matter what stage of the proceedings such rulings are made.[14] Thus, when the district court considers the evidence proffered in support of or in opposition to a motion for summary judgment,[15] its decisions with respect

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[14] *See, e.g., Cortes-Irizarry v. Corporacion Insular De Seguros*, 111 F.3d 184, 188 (1st Cir. 1997) ("The plaintiff posits that Daubert is strictly a time-of-trial phenomenon. She is wrong. The Daubert regime can play a role during the summary judgment phase of civil litigation. If proffered expert testimony fails to cross Daubert's threshold for admissibility, a district court may exclude that evidence from consideration when passing upon a motion for summary judgment.") (citations omitted); *First United Fin. Corp. v. U.S. Fidelity & Guar. Co.*, 96 F.3d 135, 136-37 (5th Cir. 1996) ("The admissibility of expert testimony is governed by the same rules, whether at trial or on summary judgment. And we review the decision of the trial court by the same abuse of discretion standard.") (citation omitted).

[15] It is well-established that "[w]hen deciding a motion for (continued...)

to admissibility of evidence should be given deference, and only its legal determinations as to the grant or denial of summary judgment based on the admissible evidence should be reviewed *de novo*. *See, e.g., Christophersen v. Allied-Signal Corp.*, 939 F.2d 1106, 1109 (5th Cir. 1991) (*en banc*), *cert. denied*, 503 U.S. 912 (1992).[16]

As a matter of the sound administration of justice, deference is "owed to the 'judicial actor . . . better positioned than another to decide the issue in question.'" *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 403 (1990) (citations omitted). Advocating a standard whereby an appellate court would be required to re-examine scientific evidence proffered to the district court under a *de novo* standard of review, thereby disregarding the significant time and effort expended by the district court in making its evidentiary determinations, merely because the district court granted summary judgment, would be nothing short of a waste of judicial resources. The rationale that, under those circumstances, an appellate court can review a "cold record" grossly undervalues the trial court's first-hand knowledge and feel for the case. *See, e.g.*, 19 *Moore's Federal*

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[15](...continued)
summary judgment, only admissible evidence may be considered." *B.F. Goodrich v. Betkoski*, 99 F.3d 505, 525 (2d Cir. 1996) (citations omitted).

[16] *See also* Childress, *A 1995 Primer on Standards of Review in Federal Civil Appeals*, 161 F.R.D. 123, 142 (1995) ("Although review over the overall [summary judgment] decision is de novo, some rulings on admissibility of evidence underlying the summary judgment decision may receive 'manifest error' deference.") (citation omitted).

Practice, § 206.05[1] at 206-29 (1997) (abuse of discretion standard "is deferential to the district court's familiarity with the proceedings and evidence in the case").

Through their roles in discovery, court conferences and interaction with counsel, district court judges are in the best position to review scientific evidence and have a distinct advantage over the appellate court in evaluating scientific evidence that is proffered in conjunction with a motion for summary judgment. Regarding these important, yet intangible aspects, this Court has noted:

> By reason of settlement conferences and other pre-trial activities, the district court may have insights not conveyed by the record, into such matters as whether particular evidence was worthy of being relied upon . . . . Moreover, even where the district judge's full knowledge of the factual setting can be acquired by the appellate court, that acquisition will often come at unusual expense, requiring the court to undertake the unaccustomed task of reviewing the entire record, not just to determine whether there existed the usual minimum support for the merits determination made by the factfinder below, but to determine whether urging of the opposite merits determination was substantially justified.

Pierce v. Underwood, 487 U.S. 552, 560 (1988).

Indeed, the two-level review of the district court's evidentiary findings and application of legal standards for dispositive motions is similar to the two-level review of the district court's factual findings and application of legal

standards in a bench trial. While the legal determinations made by the district court are reviewed *de novo*, great discretion is afforded to its factual determinations. *See* Fed. R. Civ. P. 52.

Prior to 1985, Rule 52(a) simply provided that the district court's findings of fact would not be set aside unless clearly erroneous. Some circuit courts determined that, when such factual findings did not rest on demeanor evidence and evaluation of a witness' credibility, there was no reason to defer to the trial court because the appellate court was in as good a position to review a purely documentary record. *See, e.g., Atari, Inc. v. North American Philips Consumer Elec. Corp.*, 672 F.2d 607, 614 (7th Cir.), *cert. denied*, 459 U.S. 880 (1982); *Marcum v. United States*, 621 F.2d 142, 144-45 (5th Cir. 1980). However, other circuit courts applied the "clearly erroneous" standard even when the trial court's findings were based solely on documentary evidence or on inferences from undisputed facts. *See, e.g., Maxwell v. Sumner*, 673 F.2d 1031, 1036 (9th Cir.), *cert. denied*, 459 U.S. 976 (1982); *United States v. Texas Educ. Agency*, 647 F.2d 504, 506-07 (5th Cir. 1981), *cert. denied sub nom. South Park Indep. School Dist. v. United States*, 454 U.S. 1143 (1982).

To resolve this dispute, Rule 52(a) of the Federal Rules of Civil Procedure was amended in 1985 to make clear that a trial court's factual determinations, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous. Particularly instructive is the advisory committee's notes explaining the rationale for this amendment:

The principal argument advanced in favor of a more searching appellate review of findings by the district court based solely on documentary evidence is that the rationale of Rule 52(a) does not apply when the findings do not rest on the trial court's assessment of credibility of the witnesses but on an evaluation of documentary proof and the drawing of inferences from it, thus eliminating the need for any special deference to the trial court's findings. These considerations are outweighed by the public interest in the stability and judicial economy that would be promoted by recognizing that the trial court, not the appellate tribunal, should be the finder of the facts. To permit courts of appeals to share more actively in the fact-finding function would tend to undermine the legitimacy of the district courts in the eyes of litigants, multiply appeals by encouraging appellate retrial of some factual issues, and needlessly reallocate judicial authority.

Fed. R. Civ. P. 52 advisory committee's note.

This reasoning is equally applicable to a trial court's expert evidentiary decisions in connection with dispositive motions. In performing their *Daubert* gatekeeping functions, district courts will have expended significant judicial resources in reviewing the scientific evidence proffered by the parties to determine its validity and application to the peculiar facts and circumstances of a particular case. Affording the losing party an opportunity to completely retry its case to an appellate court would not only needlessly waste the resources of the appellate courts and the parties, but it would also impede the goal of a final

and quick resolution since the appellate court will invariably need to trudge through factual arguments previously evaluated by the trial court. Moreover, the rationale for deferring to a trial court's factual findings

> is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As the Court has stated in a different context, the trial on the merits should be "the 'main event' . . . rather than a 'tryout on the road.'"

Anderson v. Bessemer City, 470 U.S. 564, 574-75 (1985) (citing *Wainwright v. Sykes*, 433 U.S. 72, 90, 97 (1977)).

CONCLUSION

Fact-specific determinations regarding the admissibility of expert evidence are best left to the discretion of the district court. Indeed, the district court's application of the *Daubert* framework affords the district court a feel for the evidence not available to the appellate court. Thus, given this Court's expressed confidence in the ability of district

court judges to undertake the fact-driven review necessary to rule on the admissibility of scientific evidence, *Daubert*, 509 U.S. at 593, the district court's determinations on admissibility of expert decisions should be reviewed under an abuse of discretion standard. Accordingly, amicus curiae respectfully requests that the judgment of the court of appeals be reversed and the case remanded.

Respectfully submitted,

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